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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 20

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

PHILIP J. ARONSON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Massachusetts (R. 10–14) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals (R. 59–62) is reported in 87 F. (2d) 272.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1937 (R. 63). Petition for writ of certiorari was filed April 3, 1937, and was

granted May 3, 1937 (R. 64). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the term "games and parts of games (except playing cards and children's toys and games)" as used in Section 609 of the Revenue Act of 1932, may be construed to include jigsaw puzzles.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes, regulations, and administrative rulings involved are set forth in the Appendix, *infra,* pp. 25–28.

STATEMENT

This is an action at law brought in the District Court for the District of Massachusetts, by the respondent herein against the petitioner herein, for the recovery of excise taxes on certain articles known as jigsaw puzzles and manufactured by The Viking Manufacturing Company, Inc. The company, of which the respondent is trustee, commenced the manufacture and sale of the articles known as jigsaw puzzles in September or October 1932 (R. 29). Pursuant to the provisions of Section 609 of the Revenue Act of 1932, and the regulations issued thereunder, the company filed with the petitioner, as Collector of Internal Revenue, returns of its gross monthly sales of such articles, covering the period from June 21, 1932, to May 1, 1933. The taxes shown due by the returns as so

filed were duly assessed, and the company paid to the Collector as excise taxes thereon a total sum of $37,021.63 (R. 3–4). The suit in the court below was for the recovery of the taxes so paid (R. 14).

Three issues were raised by the declaration and answer (R. 3–6, 6–7). (1) Were the articles so manufactured and sold games or parts of games within the meaning of Section 609 of the Revenue Act of 1932? (2) Were those articles children's games, and so exempt by the terms of the statute? (3) Were the taxes paid borne by the respondent and not passed on to the ultimate consumer? The last question is no longer involved, as the Collector has acquiesced in the ruling of the District Court that the taxes were in fact borne by the respondent (R. 11, 41).

Trial by a jury was duly waived in writing and the case was tried to the court (R. 6, 7). The evidence in the case consisted of oral testimony and certain exhibits offered and received in evidence (R. 15–41, 51–52, 53), including seven samples of the articles manufactured and sold (R. 25), which have been deposited with this Court as exhibits.

The record shows that the articles taxed were all manufactured in the same way; that is, various pictures were selected and backed up with heavier cardboard and then cut by steel dies on a power press (R. 25) into a minimum of 162 pieces and a maximum of 500 pieces (R. 27). In designing and manufacturing the articles, the company did not

limit itself to an appeal to children, but made the articles generally for whoever would buy them (R. 26). In determining the number of pieces into which the pictures were to be cut, the company was guided by the requirements of the purchasing public (R. 27). The samples of the articles transmitted to the court below and to this Court indicate that what the purchasing public received was a picture backed by thick cardboard that had been cut into pieces in an irregular manner and the pieces disassembled and enclosed in a container (R. 9, Ex. 2; R. 25). The purchasers of the articles did not receive with the purchase a facsimile of the picture that had been cut up into pieces (R. 9, Ex. 2). The articles suggest to a person seeking pastime or diversion a two-fold effort; to put the pieces together so as to show a complete picture, and to show the completed picture in the shortest possible time. During the period covered by the tax assessments, thousands of people from different parts of the country wrote to the company advising it of the time it took them to assemble the pictures (R. 30). At the time the so-called picture puzzle "craze" was at its height, neighbors and friends met together and assembled these cut pictures (R. 30). The relative time required to put together the cut pictures would create competition (R. 31).

After the evidence had been submitted, the Collector moved for judgment and submitted a request for a ruling of law that the Commissioner properly imposed the tax in question (R. 7, 8–9). The tax-

payer moved for judgment and for a special finding of the facts and submitted requests for rulings of law in 19 numbered paragraphs and for findings of fact in 30 numbered paragraphs (R. 8, 9, 42–92). Thereafter the court denied the taxpayer's motion for judgment, to which an exception was taken, and denied also the taxpayer's request for rulings of law and for findings of fact in so far as they were inconsistent with an opinion then announced (R. 9, 49–50). Exceptions were duly taken (R. 49–50). The Collector's request for a ruling of law was granted (R. 9, 49). In its opinion the court held that jigsaw puzzles were within the dictionary definition of the word "game", and that in view of the comprehensive scheme of taxation of which the tax was a part, the Commissioner's construction of the term was proper. The court further held that the puzzles taxed did not come within the statutory exception as children's games (R. 10–14). Thereafter judgment was entered in favor of the Collector (R. 10) and the respondent appealed. The Circuit Court of Appeals reversed the judgment of the District Court, holding that jigsaw puzzles cannot be regarded as games within the meaning of the statute, because the statutory term should be limited to games of contest (R. 59–62).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the term "games and parts of games", as used in Section 609 of the Revenue Act

of 1932, is limited to sports or diversions in which two or more persons contest.

2. In reversing the trial court's general finding for the petitioner, there being substantial evidence in the record to support such finding even under the appellate court's definition of the word "game."

3. In remanding the case with directions to enter judgment for the respondent.

SUMMARY OF ARGUMENT

The phrase "games and parts of games (except playing cards and children's toys and games)" in Section 609 of the Revenue Act of 1932 was properly construed by the Commissioner and the District Court to include jig-saw puzzles. Words even in Revenue Acts are presumed to be used in their ordinary and usual sense. The dictionary definitions and popular meaning of the term "games" are sufficiently broad to cover articles of amusement whether or not used in competition between two or more persons, particularly where, as here, they involve a trial of skill and resolution and what is popularly felt to be a contest against the ingenuity of the maker and against the passage of time. A narrow construction of the term "games" was rejected in the only other two cases raising the question. See *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658 (C. C. A. 4th), certiorari denied, 259 U. S. 587, holding an ouija board taxable as a game, and *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476 (C. Cls.), certiorari denied,

285 U. S. 547, holding a so-called slot machine taxable as a game. The view of the court below in the present case would exclude solitaire from the class of games, though it is universally so classified and regarded.

The provision in question is part of a comprehensive revenue measure laying an excise on luxuries. Its scope is therefore not to be restricted by technical refinements. Cf. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488.

The taxpayer's position is not aided by rules of statutory construction. The rule of *ejusdem generis* has no application, since the term in question is specific and the preceding enumeration of games is relatively slight. If the rule of *noscitur a sociis* be applied, a narrow construction is not required, for the articles enumerated include articles used by one person alone and non-competitively, such as canoe paddles, snowshoes, and fishing rods. Moreover, the express exception of toys from the category of games indicates the generality of the latter term. Commercial meaning has not been definitely shown, and in any event was not intended to be the touchstone of the scope of the provision, since with reference to sporting goods the same section of the statute provides for the inclusion of articles "commonly or commercially known" as such.

The puzzles here taxed, comprising from 162 to 500 pieces each, cannot be regarded as children's games within the statute. The ruling of the Com-

missioner classifying jig-saw puzzles of 50 pieces or less as children's games is not arbitrary and unconstitutional. Jig-saw puzzles of fewer pieces than those here involved are said by manufacturers and importers to be designed for adults and hence not subject to duty as toys under the Tariff Act. *John Wanamaker* v. *United States,* T. D. 43674 (Ct. Cust. & Pat. App.).

ARGUMENT

The tax imposed upon the respondent in respect of the jigsaw puzzles manufactured by it was assessed under Section 609 of the Revenue Act of 1932, *infra,* p. 25, which imposes a tax of 10 per cent of the sales price upon various enumerated articles, including "games and parts of games (except playing cards and children's toys and games)". The term "game" as used in the Act is defined in Regulations 46, Article 53, promulgated thereunder:

> The term "game" includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

Article 55 provides:

> Among the articles subject to tax as games are dice, chess and checker sets, ping-pong sets, roulette wheels, backgammon sets, etc.

The taxability of a jigsaw puzzle as a game has been the subject of specific consideration by the Treasury Department. The authoritative published rulings of the Department hold that such an article is properly taxed as a game, except that a jigsaw puzzle which contains fifty pieces or less is a children's game, and so specifically exempt under the statute. S. T. 567, XI–2 Cumulative Bulletin 481, *infra*, p. 27. The foregoing ruling was adhered to on further consideration in S. T. 675, XII–1 Cumulative Bulletin 403, *infra*, p. 28. These ruling were published on November 14, 1932, and May 29, 1933, respectively. It is true that at an earlier date, August 26, 1932, a manufacturer of puzzles was advised by the Deputy Commissioner that jigsaw and picture puzzles were not taxable under Section 609 of the Revenue Act of 1932 (R. 20). That advice, however, was withdrawn in a subsequent letter from the Commissioner under date of February 7, 1933, and again on April 20, 1933 (R. 39–40, 40–41).[1]

[1] Respondent makes an argument (Br. in opp., pp. 12–13) based on the substantial reenactment of the provisions of the 1917 and 1918 Acts in the 1932 Act as constituting approval of the administrative construction of the earlier Acts. The principle, however, has no application here. The statement of respondent (Br. in opp., p. 13) that under the earlier Acts jigsaw puzzles were manufactured and sold without being subject to the tax is founded solely upon an assertion of taxpayer's counsel in the course of a colloquy at the trial (R. 19). The fact seems to be that no rulings were made on the point by the Commissioner, and apparently none was requested by manufacturers. It does not

The Circuit Court of Appeals, in holding the Commissioner's definitive rulings to be improper, was of opinion that the term "games" as used in the statute must be limited to articles used in contests between two or more persons. The rejection of the Commissioner's construction and the substitution of this restricted meaning was, we submit, erroneous.

1. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. *DeGanay* v. *Lederer*, 250 U. S. 376, 381. As the case cited indicates, the rule is applicable to revenue measures as well as to non-revenue measures. The ordinary meaning of the term "games" is not limited to contests between two or more persons. A familiar broader definition is contained in the standard dictionaries. Thus, Webster's New International Dictionary defines "game" as "sport of any kind; play, frolic, or fun" and as "an amusement or diversion." The New Standard Dictionary (Funk & Wagnalls) defines "game" as "any exercise for diversion or

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even appear that jigsaw puzzles manufactured in the earlier years were of a size designed for the use of adults, or that they were manufactured in any appreciable quantity. As the question was not the subject of consideration by the Treasury Department, it cannot be said that Congress in 1932 adopted a prior administrative construction. In fact, the taxation of ouija boards and slot machines under the 1918 Act (*infra*, p. 12) indicates a prior administrative construction of the term "games" opposed to respondent's contention.

amusement; a play." The Century Dictionary and Cyclopedia defines "game" as "mirth; amusement; play; sport of any kind" and as "a play or sport for amusement or diversion." It is true that a more restricted definition of the term is contained also in these works of reference. In its more restricted meaning the word "game" is defined by Webster's New International Dictionary as "a contest, physical or mental, conducted according to set rules, and undertaken for amusement or recreation, or for winning a stake"; by the New Standard Dictionary as "a contest for recreation or amusement, to be won by chance, skill, or endurance, or by any or all combined"; and by the Century Dictionary as "a contest for success or superiority in a trial of chance, skill, or endurance, or of any two or all three of these combined."

As will appear more fully below, no persuasive reason appears why the term should be taken in its more restricted meaning here. A similar question was before this Court in *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, involving the comparable and cognate manufacturer's excise tax on "candy." In holding that sweet milk chocolate was embraced within the statutory term, this Court observed (p. 491) that the word "candy", "as the dictionary suggests, may be used in this narrower and more restricted sense. But it may be, and we think is used, as the dictionary also suggests, in a popular and more general sense * * *."

While no case involving the tax on games has come before this Court, the two decisions in the

lower courts which have construed the provision have adopted and approved the administrative interpretation. *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658 (C. C. A. 4th), certiorari denied, 259 U. S. 587; *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476 (C. Cls.), certiorari denied, 285 U. S. 547. In the former case the court held that ouija boards were subject to tax as games, and in the latter case the court held that certain so-called slot machines which were operated in an endeavor to win a stake were taxable under the statute. The court there said (p. 477): "The word 'game' is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement."[2] Neither of the articles thus held to be taxable as games was designed to be used by two or more persons in competition. The ouija board, while operated by two persons, did not involve an ele-

[2] This definition was quoted from the opinion of Judge Cooley in *People* v. *Weithoff*, 51 Mich. 203, 214, a criminal case. We do not mean to suggest that the construction of criminal statutes directed against gaming or the carrying on of games is helpful to a decision here. The purpose and policy reflected in such laws furnish distinct guides to construction. In the court below, for example, respondent relied upon Oehley v. Rex (1908), E. D. C. 38 (Cape of Good Hope). That case held that in the Cape of Good Hope, where an ordinance existed forbidding the playing of games on Sunday, golf might be played with impunity where the players "carefully and apparently deliberately avoided playing together, and proceeded round the course alone." Otherwise the law "would lead to a very far-reaching and intolerable interference with the liberty of the public." The remoteness of the case is, we think, evident.

ment of competition. The slot machine, which was operated by only one person, involved no element of competition save in the sense that the operator was competing for success against the absent owner of the machine. The same element is present in the use of jigsaw puzzles, or of any puzzles; since the user tests his ingenuity and patience against the skill of the manufacturer in an endeavor to attain the object of the puzzle successfully and in the shortest possible time.

What has just been said indicates why jigsaw puzzles are naturally regarded as games even though the concept of games be limited to contests played according to rules and with the object of achieving success or victory through chance, skill, or endurance or a combination of these. The use of jigsaw puzzles, as an examination of the exhibits in this Court will show, involves these elements. The articles are designed to be used according to rules; namely, that the pieces must be accurately fitted together, that all must be used, that a completed picture must finally be disclosed, and, in the case of the exhibits before this Court, that the identity of the completed picture be not revealed to the player in advance. The relative simplicity of the rules should not obscure their existence. The use of jigsaw puzzles, moreover, tests quickness and accuracy of perception, together with patience. Such a trial of skill and resolution is popularly thought of as a contest against the ingenuity of one who devised the test and against the passage

of time, just as a game of chance is popularly thought of as a contest against odds. If the trial is undertaken for sport, amusement, or recreation, as is concededly true in respect of jigsaw puzzles, it is naturally and properly thought of as a game. Whether one player or more than one player actively participates is unimportant. We submit that the Commissioner, no less than manufacturers of games, was entitled to take account of these popular modes of thought and action.[3]

The view of the Circuit Court of Appeals would eliminate from the class of games what is commonly known as the "game" of solitaire. "Solitaire" is defined, for example, by Webster as "a game which one person can play alone, applied to many games of cards, etc.; also, to a game played on a board with pegs or balls, in which the object is, beginning with all the places filled except one, to remove all but one of the pieces by 'jumping', as in checkers." In standard works on games, a discussion of solitaire (or patience, as it is sometimes called) is commonly included. See, e. g., *Hoyle's Games* (Foster ed., 1934), pp. 264–265, 400. Indeed, entire books have been written about the "game" of solitaire. *E. g.*, Bergholt, *Handbook to Game of Solitaire;* Bonaventure, *Games of Soli-*

[3] It is to be noted, moreover, that the puzzles are patently adapted for use even in competition between two or more persons, playing successively and comparing the number of minutes required (cf. R. 30, 31), just as in the game of golf competition is based on a count of each player's strokes.

taire; Dick, *Dick's Games of Patience;* Kearney, *Fifty Games of Solitaire;* Polk, *Thirty Games of Solitaire.*

2. The origin, history, and purpose of the taxing provision in question indicate that the court below unduly restricted its scope.

The provision taxing games first appeared in Title VI, Section 600 of the Revenue Act of 1917, which levied so-called war excise taxes. That section imposed an excise tax at various rates upon automobiles, phonographs, moving picture films, jewelry, perfumes and cosmetics, medicinal preparations, chewing gum, and cameras, and in paragraph (f) upon—

> tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, foot balls, tennis, golf, lacrosse, billard and pool balls, fishing rods and reels, billard and pool tables, chess and checker boards and pieces, dice, games and parts of games, except playing cards and children's toys and games, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold * * *.

The Revenue Act of 1918, Title IX, Section 900, contained a similar schedule of articles subject to excise taxes, listed in twenty-one paragraphs. Paragraph 5 was similar to paragraph (f) just quoted from the 1917 Act, except that certain additional articles were enumerated. The tax on "games and

parts of games (except playing cards and children's toys and games)" was retained. The Committee Reports on the 1918 Act make plain the intention of Congress to tax a wide variety of articles which are generally regarded in their nature as luxuries. The Senate Report (No. 617, 65th Cong., 3d Sess.), p. 53, and the House Report (No. 767, 65th Cong., 2d Sess.), p. 33, contain the following identical language:

> In recommending excise taxes in the proposed bill your committee has endeavored to select articles that fall within two classes: (1) Articles that are more or less a luxury because of their nature and (2) articles that become in the nature of a luxury when sold for more than a fixed price. The purpose of the committee in recommending these taxes is twofold: (1) To provide revenue and (2) to reduce extravagance.

The war excise taxes provided in the 1917 and 1918 Acts were repealed in the Revenue Act of 1921, Section 1400 (a). But in 1932, when the need for additional sources of revenue once more became acute, Congress again resorted to a manufacturers' excise tax on luxuries. The bill which became the Revenue Act of 1932 contained, in its original form in the House, a provision for a general manufacturers' excise, or sales tax, with limited exemptions, principally of foods (75 Cong. Rec. 6684). This plan, however, proved unacceptable, and after protracted debate an excise tax on selected articles was

adopted as a substitute (75 Cong. Rec. 6798–6808, 6816, 7034–7042, 7131–7134). Among the articles taxed in the 1932 Act which had been taxed in the 1918 Act are (disregarding differences in description): tires and inner tubes, toilet preparations, furs, jewelry, automobiles, sporting goods, firearms, shells and cartridges (except those sold for governmental use), cameras, candy, chewing gum.

The inclusion of the tax on games as part of a comprehensive measure to raise revenue through the taxation of luxuries was stressed in the *Baltimore Talking Board* case, *supra,* as persuasive evidence of the comprehensive scope of the tax. The court there said (280 Fed. at 661):

> The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life.

Likewise this Court in the *Hershey Chocolate Co.* case, *supra,* emphasized the character of the tax as one on luxuries and viewed the particular provision in question in that setting. "If it were necessary to our decision," the Court said (283 U. S. at 491), "in the absence of any controlling legislative history or any suggested plausible reason why a tax on candy, in a general revenue measure taxing luxuries, should be deemed to apply to one type of confectionery and not to the other, we should hesi-

tate to say that the word was used in its restricted sense * * *." So here, no plausible reason is advanced for imputing to Congress an intent to tax as a luxury articles, such as chess sets, used for amusement in a test of skill and engaged in according to rules by two or more persons, and to leave untaxed articles, such as jigsaw puzzles, used also for amusement in a test of skill engaged in according to rules, but by one person. Congress has employed a term, "games", ample in meaning to include both. We submit that the Commissioner did not err in giving to the term that meaning. "The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements." *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, 63.

3. Certain rules of statutory construction are invoked by respondent in support of the decision below.

The first of these is the rule of *ejusdem generis* (Br. in opp., p. 11), which is thought to limit the term "games and parts of games" to those games which, like the ones previously enumerated, involve an element of competition between two or more persons. But the phrase in question is not "other games", but "games", and the preceding enumeration is relatively slight. Moreover, among the articles specifically taxed in the same series with the enumerated games are skates, snowshoes, skis, toboggans, canoe paddles, and fishing rods and reels,

none of which is designed necessarily for competitive sport. Hence the phrase "all similar articles commonly or commercially known as sporting goods", which is not here involved, but which might more properly be construed according to the rule of *ejusdem generis,* is clearly meant to include articles of sport whether designed for competitive play or not. It would be an unwarranted use of the rule of *ejusdem generis* to apply it to the term "games and parts of games", where it has no proper bearing, to reach an opposite result. Cf. *Texas* v. *United States,* 292 U. S. 522, 534.

Respondent relies, in the second place, upon the rule of *noscitur a sociis* (Br. in opp., p. 11). It is true that words may be known by the company they keep; but here the company is most catholic. The articles enumerated in Section 609 include articles used for physical and for mental recreation, articles used competitively and non-competitively, articles used by one person and by more than one person. Hence even if the rule could properly be applied here, where it would seem rather to create than to solve an ambiguity (cf. *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 519), its application does not in any event aid respondent's case. Furthermore, the argument of respondent overlooks the force of the words of exception following "games and parts of games", namely, "except playing cards and children's toys and games." The mention of toys indicates that

but for the express exception they would be included in the term "games." *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84, 94; *Gooch* v. *United States,* 297 U. S. 124, 129. As the word "toys" is not limited to those used by two or more children in competition, the conclusion is fortified that the word "games" is not to be so limited.

Respondent argues also that the terms of the statute should be read in their commercial sense, and that "games" has a special and limited meaning commercially. It may well be doubted whether the testimony adduced by respondent showed a general, uniform, and well-defined trade meaning, as opposed to personal definition. (R. 15, 23, 24, 25, 29, 35, cited in Br. in Opp., p. 9.) But the short answer to the argument is that the statute itself contains a caution against confining its terms by commercial meaning. The concluding phrase is "all similar articles commonly *or* commercially known as sporting goods" [italics supplied].[4] It is not to be supposed that a more restrictive criterion is to be applied with respect to "games." Moreover, it appears that in the Tariff Acts, where the rule of commercial meaning has its chief application, no distinct classification is made of puzzles and games as such. On the contrary, jigsaw puzzles, like other games which are not spe-

[4] The court below, it may be observed, erroneously stated that in the 1918 Act the word "and" had been used. (R. 61, note.) The word "or" appears in both the 1918 and the 1932 Acts.

cially named, are classified as toys if designed for children, and otherwise according to their component material of chief value. *United States* v. *Louis Wolf & Co.*, T. D. 43719 (Ct. Cust. and Pat. App.); *John Wanamaker* v. *United States*, T. D. 43674 (*id.*). The propriety of according the word its common meaning here is thus clearer than it was in the *Hershey Chocolate Co.* case, *supra*, where it appeared that for over a hundred years the Tariff Acts had separately classified "sugar candy" and "chocolate."

Respondent's final reliance is on the doctrine that taxing statutes are to be construed strictly. It is enough to say, as this Court has many times observed, that "The rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent." *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 94, and cases cited.

4. A question remains concerning the determination of the Commissioner that the puzzles manufactured by the taxpayer were not children's games and so exempt under the terms of the statute. The Commissioner has ruled (S. T. 567, *infra*, p. 27) that for revenue purposes a jigsaw puzzle containing 50 pieces or less is regarded as a children's game. The ruling is based on the fact that a small

puzzle "may properly be considered as one so simple as to warrant classification as a children's game", whereas "Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults" (*ibid.*). The ruling has been assailed by respondent on the ground that it is "arbitrary and unreasonable and constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States" (R. 43–44).

The issue in the present case does not concern the validity of the Commissioner's ruling in general, for the puzzles manufactured by the taxpayer contain from 162 to 500 pieces (R. 27). The number of puzzles in each size group does not appear. The precise nature of the respondent's objection to the classification is not altogether clear. It is apparently not denied that in any classification required by the statute the number of pieces in a puzzle is a material factor to be considered. The objection seems to be that other factors, such as the shape and coloring of the pieces, affect the difficulty of solving the puzzle, and hence bear upon their use by children or adults (R. 36). No practical method has been suggested by which the Commissioner, in his endeavor to comply with the mandate of the statute, could take account of all possible factors bearing upon the use of these puzzles.

Neither the statute nor the Constitution requires administrative action so impractical as to be impossible.

If, then, the criterion of the number of pieces is accepted as a proper basis for classification, there is no reason to regard the action of the Commissioner as arbitrary in its application to the articles taxed in the present case. On the contrary, prior to the enactment of the 1932 Act there had been expert testimony and an authoritative ruling under the Tariff Act which support the classification here. *John Wanamaker* v. *United States*, T. D. 43674 (Ct. Cust. & Pat. App., 1929). The court there held that puzzles which contained about 250 pieces were not to be classified as toys, and the court relied heavily in that connection upon the testimony of Mr. George S. Parker, a designer and manufacturer of toys and games, appearing on behalf of the importer, who "testified that jigsaw puzzles that run 100 pieces or more are designed for adults."[5] In this view, we submit, the Commissioner's classification cannot be regarded as an inadmissible one under the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the determination of the Commissioner

[5] The same witness appeared for the respondent in the present case. His testimony on the question here discussed appears at R. 16, 18.

was correct, and that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

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OCTOBER 1937.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 609. TAX ON SPORTING GOODS.
>
> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods.

Treasury Regulations 46, promulgated under the Revenue Act of 1932:

> ART. 53. *Scope of Tax.*—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to all similar articles commonly or commercially known as sporting goods, games, and parts of games (except playing cards and children's toys and games).
>
> The term "sporting goods" includes all articles of the same general character as

those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport.

The term "game" includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

ART. 55. *Games.*—Among the articles subject to tax as games are dice, chess and checker sets, ping-pong sets, roulette wheels, backgammon sets, etc.

Parts of games are subject to the tax in the same manner as games.

ART. 56. *Articles not subject to tax.*—Gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars, and similar articles, are not subject to tax as sporting goods or games.

There are other articles used in sports or games which by reason of their general use for other purposes are not subject to the tax unless sold as a part of a uniform. Among such articles are bathing suits, sweaters, trunks, athletic underwear, plain rubber-soled shoes, hose, belts, and similar articles.

The Act specifically provides that the tax shall not attach in the case of children's toys and children's games.

Ordinary playing cards subject to the stamp tax imposed by Title VIII of the Revenue Act of 1926 are not subject to tax as games, but the tax will attach in the case of other card games.

XI-2 Cumulative Bulletin 481:

REGULATIONS 46, ARTICLE 55: Games. XI-46-5856 S. T. 567

Taxability of jigsaw puzzle as a game.

Advice is requested concerning the taxability, under section 609 of the Revenue Act of 1932, of jig saw puzzles as games.

The word "games", as used in section 609 of the Revenue Act of 1932, does not mean the games themselves but the instrumentalities used in playing them. (See *Baltimore Talking Board Co.* v. *Miles*, 280 Fed., 658, T. D. 3401, C. B. I-2, 297.) Under the strict interpretation of that word all picture puzzles could be classified as games and held to be taxable. However, children's games are specifically exempted from the tax. It would follow that if the picture puzzles, or games, are of the type ordinarily designed for the use of children, they are not taxable.

A jig saw puzzle containing comparatively few pieces may properly be considered as one so simple as to warrant classification as a children's game and exempt from the tax. Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults. For revenue purposes, it is held that if the jig saw puzzle contains 50 pieces or less, it is a children's game and not subject to the tax. If the jig saw puzzle contains more than 50 pieces it is subject to the tax as a game under section 609 of the Revenue Act of 1932.

XII–1 Cumulative Bulletin 403:

REGULATIONS 46, ARTICLE 55: Games. XII–22–6204
S. T. 675

Jigsaw and die-cut picture puzzles
(S. T. 567 affirmed)

An opinion is requested concerning the propriety of a previous ruling (S. T. 567, C. B. XI–2, 481) relative to the taxability of jigsaw and die-cut picture puzzles under section 609 of the Revenue Act of 1932.

The ruling has been further considered and the Bureau has reached the conclusion that it embodies a proper interpretation of the law. Accordingly, the ruling (S. T. 567) holding that jigsaw or die-cut picture puzzles containing more than 50 pieces are games and that sales of such games by the manufacturers, producers, or importers thereof are subject to tax under section 609 of the Revenue Act of 1932, is affirmed. Jigsaw or die-cut picture puzzles which contain 50 pieces or less will be regarded as children's games and, therefore, exempt from the tax imposed under section 609 of the Revenue Act of 1932. Manufacturers should file returns and pay the tax on the basis indicated.

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